Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THOMAS S. OBERMEYER, ATTORNEY
Petitioner,

v.

ALASKA BAR ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Alaska

PETITION FOR WRIT OF CERTIORARI

THOMAS S. OBERMEYER,
ATTORNEY *Pro Se*
(Counsel of Record)
3000 Dartmouth Drive
Anchorage, Alaska 99508
(907) 278-9455

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011
314-231-4477

3308

QUESTIONS PRESENTED FOR REVIEW

I. Did the Alaska Supreme Court err when it ruled it would not consider Obermeyer's claim that the Alaska Bar Association violated the Sherman Antitrust Act (15 U.S.C., sec. 1-7) because Obermeyer did not meet the threshold level for an administrative hearing *concerning deficiencies in his 1998 Alaska Bar Examination* under Alaska Bar Rule 6(2) which reads: "*applicant . . . shall allege facts which, if true, would establish an abuse of discretion or improper conduct on the part of Board, Executive Director, the Committee, or a master. . . .*" if the Alaska Bar Association (the Board, Executive Director, the Committee, or a master) had violated the Sherman Antitrust Act in both his contested 1998 Alaska Bar Exam and also over the last 17 years by arbitrarily and intentionally depressing passage rates?

II. Did the Alaska Supreme Court err in ruling that Obermeyer's request for admission by reciprocity was without merit and untimely because he had no current application for reciprocity before the Board, when Alaska Bar Counsel Stephen J. Van Goor in oral argument admitted upon questioning by Justice Bryner that such an application would have been rejected outright because it had not been five years since his last failed Alaska Bar Exam under revised rule 2.2(b)(3)?

III. Did the Alaska Supreme Court err in not finding that the 1996-revised Alaska Bar Rule 2.2(b)(3) was an *ex post facto* law in violation of Art. 1, Sec. 10 of the U.S. Constitution or a violation of due process when the Rule ostensibly was changed to comport

with due process considerations in reducing the restriction on reciprocity from *forever* under the former rule to *five years* for failure to pass an Alaska Bar Exam, while the resulting Rule specifically targeted Obermeyer to his continued disadvantage as the only attorney-applicant who was ever to his knowledge denied admission by this Rule?

IV. Did the Alaska Supreme Court err in not recognizing that the revised Alaska Bar Rule 2.2(b)(3) did not make admission by reciprocity from Missouri easier for Obermeyer by placing a five-year restriction on application for admission (rather than presumably forever under the former Rule), when this decision distinguished between Missouri applicants and eviscerated the Rule of reciprocity between the two states: either Alaska has reciprocity with Missouri or it has not, and any further qualifications violate prohibition against *ex post facto* law and the Privileges and Immunities Clause?

V. Did the Alaska Supreme Court err in finding *no violation of the Privileges and Immunities clause* when Obermeyer may claim dual residency as both an Alaska resident who has voted since 1978 in Alaska and spends most of his time in Alaska but maintains a home in Missouri, practices law, attends Missouri Bar Conferences and maintains his license in Missouri since 1990?

VI. Did the Alaska Supreme Court err in finding no equal protection and due process violations by the Alaska Bar Association when it routinely admitted other attorney-applicants by reciprocity who were similarly situated but for the fact they had not taken and failed an Alaska Bar Exam under Alaska Bar

Rule 2.2(b)(3)?

VII. Did the Alaska Supreme Court err in not finding abuse of discretion, and *procedural and substantive due process violations* by the Alaska Bar Association for failing to license Thomas S. Obermeyer, Attorney, by reciprocity, by 26 Alaska Bar Examinations, or any other means, when the apparent underlying *policy* of the Alaska Bar Association's grading practices is to limit entry rather than to determine minimal competence (as determined by a consistent standard, rather than the arbitrary process of weighting essays of current applicants competing against each other)?

VIII. Did the Alaska Supreme Court err in rejecting Obermeyer's claim for damages as not part of his initial claim, when, if federal antitrust law applies, treble damages would be appropriate?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	v
Table of Authorities	vi
Opinion Below	1
Jurisdictional Statement	1
Provisions, Statutes and Rules Involved	1
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	9
Appendix	A-1

TABLE OF AUTHORITIES

Page

Cases

See *In the Matter of the Application of Thomas S. Obermeyer,* 717 P.2d 382, (Alaska 1986), 57 ALR 4th 1195 6

See *In the Application of Theodore F. Stevens,* 355 P.2d 164 (Alaska 1960)..... 8

Statutes

15 U.S.C. sec. 1-7 Sherman Antitrust Act..... i

US Constitution

Art. I, sec. 10, Ex Post Facto Law 2

Art IV, Privileges and Immunities clause ii

14th Amendment - Due Process, Equal Protection ii

Alaska Bar Rules

Alaska Bar Rule 2.2 (b)(3) ..... ii, i

Alaska Bar Rule 6(2) i

Treatises

Bar Examiners' Handbook, National Conference of Bar Examiners (1980) 6, 8

OPINION BELOW

Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

See Appendix, Memorandum Opinion and Judgment No. 0987, August 23, 2000, Alaska Supreme Court, Case No. S-9002. See also letter and decision January 21, 1999, Alaska Bar Association.

JURISDICTIONAL STATEMENT

Statement of the basis for jurisdiction in US Supreme Court:

(1) Final Judgment of the Alaska Supreme Court was entered on August 23, 2000.

(2) Pursuant to 28 USC 1257 the U.S. Supreme Court has the jurisdiction to review final judgments or decrees of the highest court of a State where the validity of a statute has drawn into question constitutional provisions, or where any right or privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of the United States. This case concerns questions of Equal Protection, Procedural and Substantive Due Process, Privileges and Immunities Clause, *Ex Post Facto* law, and the Sherman Antitrust Act as concerns admission to the Alaska Bar Association by examination, reciprocity, or any other means.

PROVISIONS, STATUTES AND RULES INVOLVED

Constitutional Provisions, Statutes. Alaska Bar Rules

1. Privileges and Immunities Clause, Due Process, Equal Protection Clauses - Fourteenth Amend-

ment, US Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Privileges and Immunities Clause - Article IV: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States;"

3. Ex Post Facto Law - Art. 1, sec. 10, US Constitution: "No state shall . . . pass any . . . ex post facto law."

4. Sherman Antitrust Act - 15 USC Sec. 1-7.

5. Alaska Bar Rule 2.2(b)(3):

   (b) "An applicant is not eligible for admission under this section if:

      (1) the applicant was admitted to the practice of law in the state, territory or district without taking a written examination;

      (2) the applicant has engaged in the unauthorized practice of law in Alaska; or

      (3) *the applicant has taken and failed to pass an Alaska Bar examination, unless this occurred before the applicant engaged in the five years of practice required by (a)(2) of this section.*

6. Alaska Bar Rule 6.2: Review; Section 2:

   "An applicant who has been denied an examination permit or who has been denied certification to the

Supreme Court for admission to practice shall have the right, within thirty days after receipt of written notice of such denial, to file with the Board a written statement of appeal. Such statement of appeal shall be verified by the oath of the applicant that all statements contained therein are true, on the applicant's own knowledge, or on the basis of information furnished to the applicant. Failure to file a timely appeal statement shall constitute a waiver of any right to appeal. The statement of appeal filed by the applicant shall state all grounds upon which the applicant intends to rely and may:

(a) Object to the form of notice from which such appeal is taken on the ground that it is so indefinite or uncertain that the applicant cannot reasonably prepare his or her statement;

(b) Present the materials and documents on which the applicant relies to establish his or her eligibility to take the examination or for admission to practice, whichever is applicable.

An applicant who is denied an examination permit or who is denied certification shall allege facts, which, if true, would establish an abuse of discretion or improper conduct on the part of the Board, the Executive Director, the Committee, or a master. If the allegations in the verified statement are found to be sufficient by the Board, a hearing shall be granted. If a hearing is denied, the applicant may appeal from the denial of the hearing under the procedures of Rule 8."

STATEMENT OF THE CASE

Introduction

Thomas S. Obermeyer, Attorney, appeals the August 23, 2000 judgment of the Alaska Supreme Court affirming the January 21, 1999 decision of the Board of Governors of the Alaska Bar Association to deny his request for a hearing concerning the Alaska Bar Association's refusal to certify him for admission to the Alaska Bar by July, 1998 Examination, reciprocity, or other means and denying his other claims as either untimely or without merit. He seeks damages and alleges constitutional and statutory violations by the Board, Executive Director and Committee concerning procedural and substantive due process, equal protection, privileges and immunities and the Sherman Antitrust Act.

Facts and Proceedings

After graduating from an American Bar Association accredited law school, Thomas S. Obermeyer was failed on twenty-six Alaska Bar Examinations without alternative between 1984 and 1998. He was licensed by similar examination in Missouri in 1990 and was denied reciprocity by the Board of Governors, Alaska Bar Association in 1997. Although both the Alaska Supreme Court and the Board posited that this appeal may only concern Obermeyer's failure of the July 1998 Alaska Bar Examination, Obermeyer argued since his first court challenge in 1984 (see *In the Matter of the Application of Thomas S. Obermeyer,* 717 P.2d 382, Alaska, 1986, 57 ALR 4th 1195) that the Alaska Bar Association has systematically undermined procedural and substantive due process. The Board rejected Obermeyer's 1995 petition of antitrust violations that its consistently

low passage rates were intentional, and an abuse of discretion and a violation due process. These issues are inseparable from the grading of Obermeyer's July, 1998 Alaska Bar Examination, the passage rate of which is little more than pretext to admit in declining numbers, only around *50% - 60%* or so of applicants for the last 17 years (Briefed and exhibited in the records of both this case and Obermeyer's prior above cited case).

Reciprocity rejected under Alaska Bar Rule 2.2(b)(3)

On January 15, 1997 Obermeyer filed an application for admission by reciprocity from Missouri which was rejected because he had taken and failed an Alaska Bar Examination within the last five years under revised Alaska Bar Rule 2.2(b)(3). Obermeyer argued Alaska Bar Rule 2.2(b)(3) was revised in 1996 specifically to exclude him from admission by reciprocity, because he challenged the former rule as unconstitutional and no other attorney, to his knowledge, has been similarly affected by the revised Rule.

The Alaska Supreme Court ruled Obermeyer's present claim for reciprocity was untimely, as he had no application for reciprocity before the court at the time of this appeal. This is despite the fact that Bar Counsel in oral argument January 12, 2000 admitted in response to Justice Bryner that he would not have entertained a current application pursuant to revised Alaska Bar Rule 2.2(b)(3). The Court reasoned that the new Rule, although slightly less draconian than the former rule, was not *ex post facto* because Obermeyer could still be licensed after five years under it. Obermeyer argued that rejection under revised Alaska Bar Rule 2.2(b)(3) was a violation of Procedural and Substantive Due Process, the Privileges and Immunities Clause, Ex Post

Facto Law, and the Sherman Antitrust Act.

Although the Court ruled "it has not held that the right to practice law is fundamental for purposes of . . . due process . . . analysis" (See Appendix), Obermeyer argued that any bar exam or essay test, if rationally related to state objectives, must meet constitutional muster without improprieties in grading, procedure, and violation of the Sherman Antitrust Act.

Sherman Antitrust Act

The Alaska Supreme Court ruled that Obermeyer's claim of violation of the Sherman Antitrust Act lacked merit because he did not meet the threshold level for a hearing under Alaska Bar Rule 6.2 which required an abuse of discretion or improper conduct. Obermeyer argued that the antitrust issue could not be excluded, because all other issues were subsumed into a conscious effort on the part of the Board, the Executive Director and the Alaska Bar Examiners to limit entry by controlling consistently low passage rates. Taking the Alaska Bar Exam, therefore, was pointless, as the results were controlled and the process violated the federal Sherman Antitrust Act.

Obermeyer argued that the Alaska Bar Exam is not a test of minimal competence, since active members of the Alaska Bar could not walk in and pass the exam, which has become an intellectual contest between applicants at any one time with flexible passage rates controlled by manipulation of the essay scores. (See *In the Matter of the Application of Obermeyer,* 717 P.2d 382, (Alaska, 1986), 57 ALR 4th 1195, where Obermeyer in the record cited as an exhibit an article in the *Handbook of Bar Examiners*, 1980, written by the late Joeseph Covington,

former Director, National Conference of Bar Examiners, and former Dean, University of Missouri School of Law, which described how bar examiners may control passage rates by the grading of the essay questions.

REASONS FOR GRANTING THE WRIT

1. Obermeyer's claim of antitrust violation is not "untimely" raised since the Board's rejection in 1995 and it is not moot by repetition, as it supercedes the threshold-level hearing requirement under Alaska Bar Rule 6.2 of contesting the grading of his July, 1998 Alaska Bar Exam. All issues of the bar examination process from the qualifications to the final grading of each and every exam and applicant are subsumed into the antitrust issue, if the Alaska Bar Association consciously limits entry and controls passage rates. Therefore, Obermeyer's challenging the grading of his 1998 Alaska Bar Exam under Rule 6.2 is meaningless, as argued, and the exam is an exercise of chance rather than competence at best, and a conspiracy of exclusion at worst. Proof of such claim is demonstrated by three uncontroverted facts:

    a) The Alaska Bar Association's low passage rates nationally for 20 years are documented in Obermeyer's briefs and addenda in this and his prior 1986 case cited *infra*.

    b) Use of a multiple-regression analysis grading program to distribute all scores under a bell-shaped curve) argued in "Obermeyer I" (his 1986 case) necessarily fails some applicants even if all are Rhodes Scholars and identical clones.

c) Use of subjective essay questions allows manipulation of the passage rate up and down per *Bar Examiners Handbook*, National Conference of Bar Examiners, 1980 (cited in current and prior "Obermeyer I" -1986 case).

2. Obermeyer's claim of reciprocity from Missouri is not "untimely" or "not properly before this court," because any further applications to the Alaska Bar Association since his 1997 application would have been rejected out of hand, as admitted by Bar Counsel, Stephen J. Van Goor, in oral argument before Alaska Supreme Court Justice Bryner. No other applicant has been so excluded as Obermeyer under Alaska Bar Rule 2.2(b)(3).

3. Obermeyer's claims of violation of the Due Process and Equal Protection Clauses are valid because the Alaska Bar Association has acted unconscionably and outrageously over 17 years by taking Obermeyer's money for testing, and providing no alternative to admittance by examination, while at the same time it arbitrarily offers access to the courts through internships of law students and judicial clerks, special rules for federal and military attorneys, *ad hoc* admissions to out-of-state applicants by reciprocity at every Board meeting, and special "deals" for applicants they want to help, including US Senator Ted Stevens (see *In the Matter of Theodore F. Stevens*, 355 P.2d 164, Alaska, 1960), and a Russian businessman with a Ph.D. (see Appendix). Furthermore, it has changed the rules of admission over the years Obermeyer has been applying. No applicant has been similarly treated as Obermeyer.

4. Obermeyer posits that this issue of restricted bar admission is a national issue and many states use similar testing procedures which unreasonably deny admission to graduates of American Bar Association accredited law schools at the end of years of preparation and expense, a practice unheard of in American medical schools. Any effort to limit the number of lawyers should be done prior to graduation from American Bar Association accredited law schools.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Application of the Sherman Antitrust Act to the Alaska Bar Association is of national importance, as it affects bar associations across the country. Obermeyer notes that the President of the American Bar Association in a 2000 *ABA Bar Journal* article has asked for revised rules to allow practices over state lines with new computer technology. Therefore, the issues of this case inextricably go far beyond the reach of Obermeyer's July, 1998 Alaska Bar Exam results on which the court narrowly ruled. In this age of electronic court filings, state law practice barriers and protective guild mentalities must fall.

Respectfully submitted,

Thomas S. Obermeyer,
ATTORNEY *Pro Se*
3000 Dartmouth Drive
Anchorage, Alaska 99508-4413
(907) 278-9455

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-9002

ABA File No. 1998A002

In the Matter of the Application of:
THOMAS S. OBERMEYER,
An applicant for Admission to the Practice of Law in Alaska and membership in the Alaska Bar Association

MEMORANDUM OPINION AND JUDGMENT*

[No. 0987 - August 23, 2000]

Appeal from the Board of Governors of the Alaska Bar Association, Anchorage, Alaska.

Appearances: Thomas S. Obermeyer, *pro se,* Anchorage. Stephen J. Van Goor, Bar Counsel, Alaska Bar Association, Anchorage.

Before: Eastaugh, Fabe, Bryner, and Carpeneti, Justices. [Matthews, Chief Justice, not participating.]

I. INTRODUCTION

Thomas S. Obermeyer appeals the January 1999 decision of the Alaska Bar Association (ABA) Board of Governors (Board) to deny his request for a hearing concerning the ABA'S refusal to certify him for admission to the Alaska bar. He also seeks $4.8 million in damages for a number of alleged constitutional and statutory violations by the Board, including procedural and substan-

* Entered pursuant to Appellate Rule 214.

tive due process, equal protection, privileges and immunities, the right to travel, the Open Meetings Act, and the Sherman Antitrust Act.

Obermeyer has not met the standard for obtaining a hearing for the denial of his license before the Board. In addition, Obermeyer's claims, both in his petition for hearing to the Board and in this appeal, lack merit. Therefore, we affirm the Board's decision to deny Obermeyer a hearing and dismiss all of his claims.

II. FACTS AND PROCEEDINGS

Between 1984 and 1996 Thomas S. Obermeyer took and failed the Alaska bar examination twenty-two times. This appeal concerns his failure of the July 1998 examination.

Obermeyer graduated from the Seattle University School of Law in December 1983. He passed the February 1990 Missouri bar examination and was admitted to the Missouri bar in April 1990.

In 1986 we heard Obermeyer's appeal of the Board's denial of his admission to the Alaska bar following the July 1984 examination.[2] While we determined that Obermeyer was entitled to see his examination and representative examples of passing and failing exams, we denied his claim that the Board's administration and grading of the bar exam violated his rights to equal protection and due process.[3]

On January 15, 1997, Obermeyer filed an application for reciprocity admission, stating that he had engaged in

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[2] *In the Matter of the Application of Obermeyer (Obermeyer I)*, 717 P.2d 382, 385 (Alaska 1986)

[3] *See id.* at 387-91.

the active practice of law in the state of Missouri for the previous six-and-a-half years. When Obermeyer contacted the ABA about obtaining expedited review of his application so that he would not have to take the February 1997 bar exam if he were to be admitted by reciprocity, then-ABA president Elizabeth J. Kerttula informed Obermeyer that the ABA would not expedite consideration of his application. Kerttula also told Obermeyer his application would be denied because the fact that he had failed the Alaska bar examination within the five years preceding his application made him ineligible for admission by reciprocity. Obermeyer did not administratively appeal that determination with the ABA.

After failing the July 1998 bar exam and being denied recommendation for admission to the bar, Obermeyer filed a petition for appeal with the ABA. At its January 15, 1999 meeting, the Board denied Obermeyer's request for a hearing because he had failed to allege facts that, if true, would establish an abuse of discretion. The Board did not consider Obermeyer's claims regarding admission by reciprocity because he had no reciprocity application pending at that time; he was not challenging the denial of his 1997 application for reciprocity, but his failure of the 1998 bar examination.

Obermeyer appeals .[4]

[4] Aside from the 1999 hearing denial, Obermeyer also appeals the ABA's denial of his 1997 application for reciprocity admission and its failure to consider his Sherman Antitrust Act claim made in a 1995 appeal to the Board. Obermeyer filed his notice of appeal on February 17, 1999. This is the first time he is appealing the 1995 and 1997 decisions. While his 1999 denial of hearing claim falls within the thirty-day deadline imposed by the bar rules and the appellate rules, his 1995 and 1997 claims do not. *See* Alaska Bar R. 7(7); Alaska Bar R. 8; Alaska R. App. P. 204. As such, he has waived his right to appeal these issues. *See id.*

III. STANDARD OF REVIEW

Alaska Bar Rule 8 provides for supreme court review of any decision or interlocutory order of the Board of Governors.[5] Because "the final power and authority to determine standards for admissions to the practice of law in Alaska reside in this Court,"[6] we independently review any decision of the Board.

IV. DISCUSSION

A. The ABA's January 1999 Refusal to Grant Obermeyer a Hearing Was Proper.

In order to be granted a hearing on a denial of certification for admission to the bar, an applicant is required to meet the standards of Bar Rule 6(2):

> An applicant who is denied an examination permit or who is denied certification shall allege facts which, if true, would establish an abuse of discretion or improper conduct on the part of the Board, the Executive Director, the Committee, or a master. If the allegations in the verified statement are found to be sufficient by the Board, a hearing shall be granted.

We interpreted Rule 6 (2) and elaborated upon the standard for obtaining a hearing before the ABA Board of Governors in *Obermeyer I*:

> A hearing is required in response to sufficient allegations of either procedural improprieties or substantive deficiencies. Conclusory statements which fail to allege specific factual inadequacies

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[5] *See* Alaska Bar R. 8.

[6] *Sullivan v. Alaska Bar Ass'n*, 551 P.2d 531, 533 (Alaska 1976)

with either the grading system or its application to the appellant's exam are insufficient.[7]

Obermeyer has not met this standard. Upon reviewing the materials Obermeyer submitted to the Board when requesting his hearing, we conclude that Obermeyer did not make sufficient factual allegations of substantive deficiencies[8] or procedural improprieties which, if true, would establish an abuse of discretion or improper conduct on the part of the ABA. Therefore, he is not entitled to a hearing under Rule 6(2).

B. Obermeyer's Arguments in His Petition to the Board[9]

1. Admission by reciprocity

The Board declined to grant Obermeyer a hearing on the issue of admission by reciprocity because he was not appealing ABA's denial of admission by reciprocity. Moreover, regardless of whether he had a pending application, Obermeyer is not eligible for admission by reciprocity.[10] Bar Rule 2(2)(b)(3) explicitly states that "[a]n

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[7] *Obermeyer I,* 717 P.2d at 386 (citations omitted).

[8] Obermeyer has not made any allegations of substantive errors in the grading of the July 1998 bar examination, either with respect to himself or the examination in general. Nothing in his statement of appeal, petition, or his supplemental memoranda sets forth such a challenge. He has therefore waived such arguments. *See Gates v. City of Tenakee Springs,* 822 P.2d 455, 460 (Alaska 1991) (Issues not presented below will not be considered by appellate court.).

[9] Although we believe that the Board properly denied Obermeyer's request for a hearing on the grounds contained in his petition and supplemental memoranda to the ABA, we will review each claim along with those raised in this appeal for the first time.

[10] Because Obermeyer had no reciprocity application pending, the reciprocity issue is not properly before this court.

applicant is not eligible for admission under this section if... the applicant has taken and failed to pass an Alaska Bar examination, unless this occurred before the applicant engaged in the five years of practice required by (a)(2) of this section." Since Obermeyer has failed an Alaska Bar examination within the past five years, he does not meet the requirements for admission by reciprocity.

2. Due process

Obermeyer makes numerous substantive and procedural due process arguments in his appeal.[11] He argues that the ABA "has infringed upon his fundamental right to life, liberty and pursuit of happiness, his vested interest in his Missouri law license, and his right to practice in Alaska by reciprocity." This argument is identical to the due process and equal protection argument we dismissed in *Obermeyer I,* in which we noted:

> Obermeyer's substantive due process . . . argument is quite ambiguous. It hinges on his claim that the pursuit of a legal career is a fundamental interest. . . . This court has not held that the right to practice law is fundamental for purposes of . . . due process . . . analysis.[12]

In *Obermeyer I,* we stated that "[i]n order to establish a due process violation, Obermeyer must establish that

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[11] Obermeyer actually has subtly changed his arguments between his petition to the Board and his brief to this court in a number of instances. Because our task on this appeal is to determine whether Obermeyer met the threshold for obtaining a hearing under Bar Rule 6, we analyze the arguments set out in the petition

[12] *Obermeyer I,* 717 P.2d at 386.

the challenged procedures are so irrational or arbitrary, or so lacking in fairness as to shock the universal sense of justice."[13]

Obermeyer's petition does not meet this threshold; he merely makes generalized allegations that the ABA cannot be unbiased because of the circumstances behind its existence and unsupported conjectures about the Board benefitting by licensing fewer applicants for admission to the bar. As we said with regard to related complaints in *Obermeyer I:* "Obermeyer's criticisms of the administration of the exam amount to no more than disputes with the ABA about the ideal way to handle the bar exam. They do not establish violations of . . . due process. . . ."[14]

3. Equal protection

Obermeyer contends that the ABA has violated the equal protection clauses of the United States and Alaska Constitutions by refusing to allow him admission to the Alaska bar by reciprocity. Obermeyer has not established an equal protection violation because he has not demonstrated that the Board has treated him differently from similarly situated persons.

Obermeyer's claim that the ABA discriminated against him by altering Alaska Bar Rule 2(2)(b) specifically to exclude him lacks both factual and logical support. Prior to 1996, Rule 2(2)(b) permanently excluded any person who had failed an Alaska bar examination from admis-

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[13] *Id.* at 386-87 (citations omitted).

[14] *Id.* at 391.

sion by reciprocity.[15] The rule change of which Obermeyer complains made it possible for persons who have failed the Alaska bar exam to be waived in, so long as they have been practicing law for five of the past seven years and have not failed an Alaska bar exam in the past five years.[16] In other words, the change complained of actually made reciprocity admission possible for Obermeyer, where before it was absolutely precluded. Thus, his arguments that the ABA targeted him in an effort to exclude him from the bar are quite unpersuasive.

None of Obermeyer's examples of persons who have allegedly been given preferential treatment by the ABA provides evidence that the facially neutral reciprocity admission rule is applied in an intentionally discriminatory manner or that it results in a disproportionate impact to a protected class. The circumstances surrounding the licensing of Nikolai Shcherbina, Maria Greenstein, and Ted Stevens do not support Obermeyer's argument because they were not persons who sought reciprocity admission to the Alaska bar after having failed the Alaska bar examination within the five years preceding their applications for admission.[17]

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[15] Prior to its amendment in April 1996, Bar Rule 2(2)(b) provided:

> Attorneys admitted to the practice of law in other states, territories, or districts without taking a written examination will not be eligible for admission under this section. *An applicant may not be admitted to the practice of law under this section if he or she has taken and failed to pass an Alaska Bar examination* or engaged in the unauthorized practice of law in Alaska.

Former Alaska Bar R. 2(2)(b) (1995) (emphasis added).

[16] See Alaska Bar R. 2(2)(b)(3).

[17] Dr. Shcherbina was licensed as a "foreign law consultant," which gives him very limited powers to provide legal services and

(Footnote 17 continued on next page)

Since Obermeyer has presented no other evidence and made no other factual allegations in his petition to demonstrate that the Board abused its discretion or behaved improperly by admitting similarly situated persons to the Alaska bar, he is not entitled to a hearing on equal protection grounds.

4. Sherman Antitrust Act

Obermeyer claims that the bar association's actions with respect to its monopoly of state licensing, its anticompetitive practices, and its abuse of power violate the Sherman Antitrust Act.[18] Regardless of whether the Sherman Antitrust Act can be applied to an organization such as the ABA, Obermeyer's claim lacks merit and does not meet the standard required for obtaining a hearing as set out in Bar Rule 6(2). Obermeyer's "abuse of power" conspiracy theories and conclusory policy arguments have no factual backing in the record and do not constitute factual allegations to suggest that the ABA abused its discretion or engaged in improper conduct, or that these allegedly anticompetitive practices had any bearing on the grading of his individual examination.

(Footnote 17 continued)

does not permit him to appear before any court or prepare pleadings except in special circumstances. *See* Alaska Bar R. 44.1. Maria Greenstein was admitted because she met the requirements of the reciprocity rule and had not failed an Alaska bar examination. The example of Senator Stevens is not helpful because Rule 2(2) did not exist in 1960, when this court ordered that Stevens be admitted by reciprocity. *See Application of Stevens*, 355 P.2d 164, 164-66 (Alaska 1960).

[18] *See* U.S.C. §§ 1-7 (2000).

5. Alaska takings clause

Obermeyer claims that the ABA's denial of his law license is a taking of private property "no less than by eminent domain." The private property in question, he contends, is "his reasonable investment-backed expectation in a legal career over a 15-year period," which vested when he completed law school.[19]

The Board did not err in refusing to grant a hearing on this issue because Obermeyer did not make any factual allegations that would establish an abuse of discretion or improper conduct on the part of the Board. In addition, this argument is legally incorrect because the ABA is not taking anything from Obermeyer. He has no property right in receiving a reciprocity admission to Alaska's bar, as he alleges. He has no vested right to practice law in Alaska because he has not been admitted to the Alaska Bar. The ABA also did not take away his right to practice law or advance his legal career; he can still practice law in Missouri or any other state that would allow him to waive into its bar. Obermeyer's claim that the ABA rules infringe upon his right to work in Alaska is weak; the ABA rules permit him to receive credit towards his reciprocity admission through practice in Alaska as a federal attorney or work as a law clerk.[20] Accordingly, we reject Obermeyer's takings argument.

6. Alaska Bar Rule 43.1

Obermeyer alleges that Alaska Bar Rule 43.1, which allows military attorneys who are not admitted to the Alaska bar to represent military clients for a limited two-

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[19] In his brief, however, Obermeyer argues that his right vested when he became licensed to practice law in Missouri.

[20] See Alaska Bar R. 2(2)(c).

year period in Alaska courts[21] violates his right to equal protection. This argument is unavailing: Obermeyer is not petitioning to become a military attorney. In addition, the military attorney rule also specifies that individuals authorized to practice under this rule cannot have previously failed the Alaska bar exam.[22]

C. Substantive Issues Raised in This Appeal

In addition to the issues raised in his petition to the Board, Obermeyer brings four new claims before this court: (1) Alaska Bar Rule 2(2)(b) is an *ex post facto* law; (2) the Board violated his right to travel; (3) the Board violated the Privileges and Immunities Clause of the United States Constitution; and (4) the Board violated the Open Meetings Law. All of these arguments are meritless and legally erroneous, thereby entitling Obermeyer to no relief from this court. In addition, since he once again makes no factual allegations that would, if true, demonstrate an abuse of discretion or improper conduct on the part of the Board, he is not entitled to a hearing before the Board on any of these issues.

1. *Ex post facto* law

Obermeyer alleges that the ABA'S revised version of Bar Rule 2(2)(b) is an *ex post facto* law because it makes impermissible conduct that had previously been permissible. Obermeyer's argument is illogical because the ABA's rule change actually makes it possible for

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[21] *See* Alaska Bar R. 43.1.

[22] *See id.*

Obermeyer to someday be admitted to the Alaska bar by reciprocity.[23]

2. Privileges and immunities clause

Obermeyer's allegation that the Board's refusal to license him violates the privileges and immunities clause is baseless, as we established in *Obermeyer 1*.[24] There, we explicitly stated that this clause is inapplicable because Obermeyer is a resident of Alaska.[25]

3. Right to travel

Obermeyer's argument that the Board's actions infringed on his right to travel is legally erroneous because the requirements for admission to the Alaska bar neither create distinctions between residents and non-residents nor create distinctions between residents by way of a durational residency requirement. Where distinctions between Alaska residents are concerned, we have stated that "[t]he right to interstate or intrastate travel is impinged upon only when a governmental entity creates distinctions between residents based upon the duration of their residency, and not when distinctions are created

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[23] As noted above in Part IV.B.3, the revised rule states that a person who has failed the Alaska Bar can be admitted by reciprocity if he or she failed the Alaska bar examination more than five years before. Under the old rule, which stated that a person who had failed the Alaska bar exam could not be admitted under reciprocity, Obermeyer had no chance of being admitted under reciprocity as he had already failed the Alaska Bar several times before the revised Rule 2(2)(b) was put into place. Alaska Bar R. 2(2)(b).

[24] *In the Matter of the Application of Obermeyer* (*Obermeyer I*), 717 P.2d 382, 386 (Alaska 1986).

[25] *See id.*

between residents and nonresidents."[26] Since the duration of residency is no longer a factor in Alaska bar admission,[27] Obermeyer's argument lacks legal merit.

4. Open Meetings Act

Obermeyer contends that the ABA violated the Open Meetings Act,[28] when his appeal was before the Board of Governors. Obermeyer has misread the law. Section (d)(1) of the Open Meetings Act explicitly states that the Act does not apply to "a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding."[29] The Board meeting in question concerned Obermeyer's appeal, under Bar Rule 6(2), of the ABA's October 1998 denial of his certification for admission to practice. Since the Board was required by Rule 6(2) to examine the proffered evidence and decide whether Obermeyer had made sufficient allegations to be granted a hearing, the meeting was undoubtedly an "adjudicatory proceeding." Therefore, the Board did not violate the Open Meetings Act and Obermeyer is entitled to no relief.

5. Claim for money damages

Obermeyer seeks damages in excess of $4.8 million from the ABA, raising this claim for the first time before

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[26] *Gilman v. Martin*, 662 P.2d 120, 125 (Alaska 1983)

[27] *See Sheley v. Alaska Bar Ass'n*, 620 P.2d 640, 645 (Ala 1980) (holding that a thirty-day residence requirement for bar applicants was unconstitutional).

[28] AS 44.62.310 provides, in relevant part, that "[a]ll meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law."

[29] AS 44.62.310(d)(1).

this court. Money damages were not a consideration in the Board decision he is appealing — a denial of a hearing regarding the Board's decision not to admit Obermeyer to the bar after he failed the July 1998 bar exam. Since the damages claim is a new issue, we decline to hear it.[30]

IV. CONCLUSION

Because Obermeyer has not met the standard for obtaining a hearing for the denial of his license before the ABA, we AFFIRM the Board's decision to deny Obermeyer a hearing regarding bar admission. We also reject Obermeyer's remaining claims, which are either untimely[31] or without merit.

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[30] *See Hilderbrand v. Hilderbrand*, 962 P.2d 887, 891 (Alaska 1998) (citation omitted).

[31] Obermeyer's challenges to his 1995 hearing request and 1997 reciprocity application are untimely. *See* Alaska R. App. P. 204(a)(1).

Order Regarding Fees and Costs

In Re the Application of Thomas S. Obermeyer

Supreme Court No. S-09002

Date of Order: 8/23/00

Each party is to bear its own costs and attorney's fees in the supreme court in this matter.

Entered at the direction of individual Justice.

Clerk of the Supreme Court

/s/ Judi Udland
Deputy Clerk

cc: Authoring Justice
Trial Court Appeals Clerk

Distribution:

Thomas Obermeyer
3000 Dartmouth Drive
Anchorage, AK 99508

Stephen J. Van Goor
Alaska Bar Association
510 L Street #602
Anchorage, AK 99501

APPENDIX B

ALASKA BAR ASSOCIATION

January 21, 1999

Thomas Obermeyer
3000 Dartmouth
Anchorage, AK 99508

Dear Mr. Obermeyer:

The Board of Governors reviewed your appeal on January 15, 1999 and determined that you did not meet the standard in Bar Rule 6 of alleging facts, which, if true, would establish an abuse of discretion. In particular, the Board concluded that you had not identified any disputed material facts, but only conclusory statements of law. Therefore the Board had denied your appeal.

Pursuant to Alaska Bar Rule 7, Section 7, the decision of the Board concerning your appeal will be considered final unless an appeal to the Supreme Court is filed within 30 days following service of this letter.

Sincerely,

/s/ Deborah O'Regan
Deborah O'Regan
Executive Director

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P.O. Box 100279
Anchorage, AK 99510-0279